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In the Supreme Court of the United States

OCTOBER TERM, 1969

**HEVI-DUTY ELECTRIC COMPANY,
A DIVISION OF SOLA BASIC INDUSTRIES, INC.,**

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

HEVI-DUTY ELECTRIC COMPANY,
A DIVISION OF SOLA BASIC INDUSTRIES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Hevi-Duty Electric Company, a Division of Sola Basic Industries, Inc. (hereinafter called "Company"), prays that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fourth Circuit (hereinafter called "Court of Appeals") granting the petition of the National Labor Relations Board (hereinafter called "Board") for enforcement of its order issued against the Company.

OPINION BELOW

The opinion of the Court of Appeals is reported officially as follows: *N.L.R.B.* v. *Hevi-Duty Electric Co., a Div. of Sola Basic Indus. Inc.*, 410 F.2d 757 (4th Cir. 1969). Such opinion is appended hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals is dated May 16, 1969, and was filed and entered on that same date. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1966).

QUESTION PRESENTED

Under the guarantee of due process of law provided in the Fifth Amendment to the United States Constitution and the Board's own administrative standards, is an objecting party entitled to a post-election evidentiary hearing when, during an *ex parte* investigation on his objections to a representation election, prima facie evidence is supplied which presents substantial and material factual issues regarding the validity of such election?

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision, statutes and regulations which this case involves are as follows:

United States Constitution, Amendment V.

Section 1254(1) of Title 28 of the United States Code.

Section 160(e) of Title 29 of the United States Code.

Section 102.69(e) of the National Labor Relations Board Rules and Regulations.

The text of this constitutional provision, statutes and regulations is set forth in Appendix F.

STATEMENT OF THE CASE

The Company is a Wisconsin corporation engaged in the manufacture of transformers and other electrical devices at its Goldsboro, North Carolina plant. (4th A. 28, 32)[1] It is engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended (hereinafter called "Act"). (4th A. 19).

Pursuant to a representation petition filed by the Communications Workers of America, AFL-CIO (hereinafter called "Union"), and a stipulation for certification upon consent election signed by all interested parties and approved by the Regional Director, Region 11, a representation election was conducted by the Board among the production and maintenance employees of the Company's Goldsboro, North Carolina plant on November 1, 1967. (4th A. 3-7) The Union received a majority of the valid votes cast in this election. (4th A. 7-8)

Subsequent to the vote, the Company filed timely objections, alleging in substance as follows: (1) that the conduct of one of the Union's observers was such as to impair the exercise of free choice, and (2) that the conduct of the Union in making a last minute challenge of an observer selected by the Company further impaired the free election process. (4th A. 9)

The Regional Director, Region 11, conducted an *ex parte* investigation of the objections and issued a report recommending that both objections be overruled. (Appendix E) The Company filed exceptions to the Regional Director's report, requesting the rejection of his recommendations and

[1] References to the Appendix printed for the use of the Court of Appeals and filed with this Court are designated "4th A.".

the direction of a hearing to determine the facts of the case. (4th A. 13-18) By decision dated February 12, 1968, the Board adopted the Regional Director's findings and recommendations and certified the Union as bargaining representative in the appropriate unit. (Appendix D)

Thereafter, the Company refused to bargain with the Union because it believed the election to be invalid and wanted to obtain judicial review of the Board's decision in the representation case, i.e. Case No. 11-RC-2623. (4th A. 32) As a result of the Company's position, unfair labor practice charges were filed, and a complaint was issued, alleging that by its refusal to bargain, the Company was in violation of Section 8(a)(1) and (5) of the Act. (4th A. 27-31)

In response to a trial examiner's order directing the parties to show cause as to whether or not the General Counsel's motion for summary judgment should be granted, the Company filed a memorandum in opposition to that motion on the basis of the Board's decision in *Milchem, Inc.*, 170 NLRB No. 46, issued March 14, 1968. (4th A. 33-34, 44-47) Because the Trial Examiner believed that the application of *Milchem, Inc.* was appropriate for examination in the representation case, he conditionally deferred ruling on the motion for summary judgment in order to afford the Company time to file a motion for reconsideration with the Board in Case No. 11-RC-2623. (4th A. 47-48) Thereupon, the Company filed its motion for reconsideration, and, by order dated May 7, 1968, the Board found the Company's motion to contain nothing not previously considered by it in Case No. 11-RC-2623. (4th A. 21-26)

Subsequently, the trial examiner proceeded to issue his decision granting the General Counsel's motion for summary judgment in the unfair labor practice proceeding,

and the Company filed exceptions to that decision. (Appendix C, A. 58) The Board adopted the trial examiner's findings, conclusions and recommendations in their entirety and, on July 1, 1968, issued its decision and order that the Company bargain with the Union upon request and post the usual notice. (Appendix B)

The case came before the Court of Appeals upon application for enforcement of the Board's order filed November 29, 1968. The basis for jurisdiction in that court was Section 10(e) of the Act, 29 U.S.C. §160(e). (Appendix B, p. App. 3) The Court of Appeals in a *per curiam* decision, granted enforcement of the Board's order. (Appendix A)

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals conflicts with decisions of the other courts of appeals.

While the Court of Appeals in its opinion acknowledged that a post-election hearing is demandable if objections and exceptions raise material and substantial factual issues, it upheld the Board's refusal to grant a hearing on the Company's objections because it could not say "that the Board's action was unsustainable in law upon the facts found, or that there was not substantial support in the evidence for these findings". (Appendix A, pg. App. 2) The decision of the Court of Appeals which views the issue as being one of substantial evidence conflicts with decisions of other courts of appeals regarding the criteria for obtaining a hearing in post-election representation proceedings.

The United States Court of Appeals for the Fifth Circuit has stated that "§ 8(a)(5) orders which rest on crucial factual determinations made after *ex parte* investigations and without hearing cannot stand". *N.L.R.B.* v. *Air Control Prods. of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (5th Cir. 1964). It is the well established position of the Fifth Circuit that a post-election hearing is required where the objecting party supplies prima facie evidence, presenting "substantial and material factual issues", which would warrant setting aside the election. *N.L.R.B.* v. *Smith Indus., Inc.*, 403 F. 2d 889, 892 (5th Cir. 1968); *see N.L.R.B.* v. *Sidran*, 181 F. 2d 671 (5th Cir. 1950); *N.L.R.B.* v. *West Tex. Util. Co.*, 214 F. 2d 732 (5th

Cir. 1954); *N.L.R.B.* v. *Dallas City Packing Co.*, 230 F. 2d 708 (5th Cir. 1956); *N.L.R.B.* v. *Air Control Prods. of St. Petersburg, Inc., supra; United States Rubber Co.* v. *N.L.R.B.*, 373 F. 2d 602 (5th Cir. 1967); *Home Town Foods, Inc.* v. *N.L.R.B.*, 379 F. 2d 241 (5th Cir. 1967); *N.L.R.B.* v. *Ortronix, Inc.*, 380 F. 2d 737 (5th Cir. 1967); *Howell Refining Co.* v. *N.L.R.B.*, 400 F. 2d 213 (5th Cir. 1968); *Monroe Mfg. Co., Div. of Continental Oil Co.* v. *N.L.R.B.*, 403 F. 2d 197, 201 (5th Cir. 1968); *N.L.R.B.* v. *Genesco, Inc.*, 406 F. 2d 393, 397 (5th Cir. 1969).

The position of the Fifth Circuit is also the rule in other courts of appeals. *E.g., N.L.R.B.* v. *Joclin Mfg. Co.*, 314 F. 2d 627 (2d Cir. 1963); *N.L.R.B.* v. *Capital Bakers, Inc.*, 351 F. 2d 45 (3rd Cir. 1965); *Sonoco Prods. Co.* v. *N.L.R.B.*, 399 F.2d 835 (9th Cir. 1968); *Excelsior Laundry* v. *N.L.R.B.*, 409 F. 2d 70 (10th Cir. 1968).

The conflict between the view expressed by the Court of Appeals in this case and the position adopted by the other courts of appeals is brought sharply into focus by the United States Court of Appeals for the Third Circuit in *Capital Bakers, Inc., supra* at 51 wherein that court stated:

> "* * * We are not concerned with the question of whether or not the evidence considered by the Regional Director is sufficient to support his finding, or whether the rejected evidence of respondent would overcome the finding; we are solely concerned with the fact that the offer and the finding raise a substantial conflict of fact which the Board's Rules and Regulations require to be determined by a hearing."

It is recognized that the objecting party may be denied a hearing when the Regional Director or the Board either assumes the facts alleged are true and decides on that basis, or they conclude that the alleged facts are legally

irrelevant. *N.L.R.B.* v. *Howard Johnson Co.*, 398 F. 2d 435, 441 (3rd Cir. 1968); *N.L.R.B.* v. *Smith Indus., Inc., supra* at 892; *N.L.R.B.* v. *Air Control Prods. of St. Petersburg, Inc., supra* at 249. However, neither of these two bases were used to dispose of the Company's objections in this case. To the contrary, the Regional Director, and subsequently the Board, simply ruled that the facts were not as alleged by the Company. (4th A. 10-13, 18-20)

Statements given to the Regional Director by Company witnesses during the *ex parte* investigation set forth the facts with regard to the Company's primary objection, to wit: contrary to the special instructions of the Board agent conducting the election and the Board's standard instructions to election observers:

(a) The Union observer cavorted down the aisles, dancing, shouting, ("Hollering" was the word used by several witnesses) and waving his sign in the air with an exaggerated bouyancy and swaggering effect far different from his normal restrained behavior.

(b) He stopped voters on the way to the polls and engaged them in conversations.

(c) He made it a point to have at least a few words to say to almost every voter, in the manner of a politician running for office—one witness described his appearance as rather like a politician out kissing babies.

(d) He shouted an obscene characterization of one voter in a tone of voice loud enough to be heard almost throughout the entire plant.

(e) There was a strong indication that he had been using intoxicating liquors.

The Company objected to this behavior because it conveyed the impression to the voters of Union dominance over the Board's election procedures and impeded the free election process. The extent and nature of the Union observer's objectionable conduct was confirmed by eye witnesses. (4th A. 13-18) The only possible method by which the Regional Director could conclude, as he did, that the Union observer's behavior had not affected the election process was by weighing conflicting testimony against the Company, discrediting other Company testimony entirely and resolving issues of credibility against the Company. (4th A. 10-13)

It is also evident from his report that the Regional Director considered the Company's objections separately in concluding that neither presented a substantial and material factual issue for resolution in an evidentiary hearing. In this regard, the Fifth and Ninth Circuits are of the opinion that an objecting party's right to a post-election hearing must be determined on the basis of the cumulative effect of the alleged objectionable acts. *N.L.R.B.* v. *Smith Indus., Inc., supra* at 895; *Howell Refining Co.* v. *N.L.R.B., supra* at 218; *Sonoco Prods. Co.* v. *N.L.R.B., supra* at 843; *Home Town Foods, Inc.* v. *N.L.R.B., supra* at 244.

The differences in the approaches taken by the Court of Appeals and other courts of appeals in determining whether a post-election hearing is required mean that an objecting party's right to such a hearing can depend in the final analysis upon which court of appeals considers his claim. That such is the situation in this case is demonstrated by the Fifth Circuit's decision in *N.L.R.B.* v. *Monroe Auto Equip. Co., Hartwell Div.*, 406 F. 2d 177 (5th Cir. 1969). One of the employer's post-election objections in that decision is essentially identical to the Com-

pany's objection with regard to the Union observer's conduct on election day. As in this case, the Regional Director had concluded that a preponderance of the evidence showed that the union observer had not campaigned and in any event such contention was not of such serious nature as to warrant setting aside the election. *Id* at 179. Notwithstanding a strong denial of the employer's claim which appeared from the Regional Director's *ex parte* investigation, the Fifth Circuit held that a hearing was required in order to resolve the conflicting statements of the witnesses. Thus, it is apparent that the decisional conflict between the Court of Appeals and the other courts of appeals is such that contrary results are produced in decisions involving almost identical factual situations.

II. The case presents an important question of federal law which has not been, but should be, settled by this Court.

The case presents an opportunity for this Court to clarify for these and future litigants the extent to which an objecting party is entitled to a post-election evidentiary hearing pursuant to the constitutional principles of due process and the Board's administrative standards.

It is axiomatic that crucial disputed facts should be resolved by taking testimony under oath, granting the opportunity to cross-examination and providing the procedural safeguards of a hearing. While the truth of this proposition is self-evident, guidelines as to its application with regard to an objecting party's right to a post-election hearing are lacking. Clearly such guidelines are needed when two courts of appeals will reach exactly opposite decisions on essentially the same facts and issues. With such guidelines available to the Board's agents and

parties in future representation matters, the uncertainty surrounding the extent to which a post-election hearing is required will dissipate, ending the expensive and protracted litigation which such uncertainty spawns. It is only when the right to such a hearing is defined that the parties to a representation election can be assured that their right to have such election conducted in the laboratory conditions promised by the Board and required by the courts will be fully protected. *See Sewell Mfg. Co.*, 138 NLRB 66, 70 (1962); *Tyler Pipe and Foundry Co.* v. *N.L.R.B.*, 406 F. 2d 1272, 1275 (5th Cir. 1969).

CONCLUSION

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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735 North Water Street
Milwaukee, Wisconsin
Attorneys for Petitioner

Dated August 12, 1969

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 13,034

National Labor Relations Board,

Petitioner,

v.

Hevi-Duty Electric Company, a Division of Sola Basic Industries, Inc.,

Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

(Argued May 7, 1969 Decided May 16, 1969).

Before Bryan, Winter and Craven, Circuit Judges

Edward E. Wall, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Glen M. Bendixsen, Attorney, National Labor Relations Board, on brief) for

Petitioner, and Herbert P. Wiedemann (F. Roberts Hanning, Jr., on brief) for Respondent.

PER CURIAM:

The National Labor Relations Board's order of July 1, 1968, 172 NLRB No. 98, required the Hevi-Duty Electric Company, a Division of Sola Basic Industries, to bargain collectively with the union purporting to represent its employees at the Goldsboro, North Carolina plant. In this, the Board overruled the employer's objections to the validity of the union's election as the representative. The exception was to the refusal of the Board to allow a conventional hearing on the objections. Instead, decision was made on the Regional Director's report after investigating the charges and considering ex parte affidavits and statements of witnesses.

Concededly, such a hearing is demandable if the objections and exceptions raise material and substantial factual issues. NLRB v. Bata Shoe Company, 377 F2d 821, 826 (4 Cir. 1967). The Board concluded they did not. Because we cannot say that the Board's action was unsustainable in law upon the facts found, or that there was not substantial support in the evidence for these findings, we must deny the company's petition to set the order aside, and grant the Board's petition for its enforcement.

Enforcement granted.

APPENDIX B

172 NLRB No. 98 D-1182
Goldsboro, N.C.

UNITED STATES OF AMERICA
Before The National Labor Relations Board

Hevi-Duty Electric Company,
A Division Of Sola Basic Industries, Inc.
and Case No. 11-CA-3567
Communications Workers Of America, AFL-CIO

DECISION AND ORDER

On May 13, 1968, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order, the Recommended Order of the Trial Examiner and orders that Respondent, Hevi-Duty Electric Company, a Division of Sola Basic Industries, Inc., Goldsboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D. C.—July 1, 1968.

John H. Fanning, Member
Howard Jenkins, Jr. Member
Sam Zagoria, Member
National Labor Relations Board

(Seal)

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[1] Delete from paragraph 2(b) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefor "on forms provided . . .".

APPENDIX C

TXD-304-68
Goldsboro, N.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D.C.

Hevi-Duty Electric Company,
A Division Of Sola Basic Industries, Inc.
and Case No. 11-CA-356
Communications Workers Of America, AFL-CIO
Jerome F. Connor, Esq., for
the General Counsel.
Herbert P. Wiedemann, Esq.,
(Foley, Sammond & Lardner),
Milwaukee, Wisc., for the Respondent.
William A. McHugh, Jr., Esq.,
(Adair, Goldthwaite, Stanford & Daniel)
Atlanta, Ga., for the Union.

TRIAL EXAMINER'S DECISION

Statement of the Case

The case involves an employer's refusal to bargain with a certified union on the ground that the employer's objections to the election were improperly overruled without hearing, and that the certification is consequently invalid.[1]

[1] Official notice is taken of the record in the representation proceeding, *Hevi-Duty Electric Co.*, 11-RC-2623, as the term "record" is defined in Section 102.68 and 102.69(f) of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as revised January 1, 1965).

Upon a charge filed on March 12, 1968 by Communications Workers of America, AFL-CIO, herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 11, issued a Complaint and Notice of Hearing dated March 14, 1968 against Hevi-Duty Electric Company, A Division of Sola Basic Industries, Inc., Goldsboro, North Carolina, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act as amended. Copies of the charge, complaint, and notice of hearing were duly served upon the Respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance that pursuant to a Stipulation for Certification upon Consent Election an election involving the Union and the Respondent was held on November 1, 1967, in an appropriate unit hereinafter described, in which the Union received a majority of the valid votes cast; that upon timely objections filed by the Respondent to conduct assertedly affecting the results of the election the Regional Director, after having conducted an investigation, issued his Report on Objections on December 4, 1967, recommending that the objections be overruled and that the Union be certified; that the Respondent thereafter filed exceptions to the Regional Director's report on objections; that on February 12, 1968, the Board issued its Decision and Certification of Representative adopting the Regional Director's findings and recommendations and certifying the Union, with the statement that the Respondent's objections raised no material or substantial issues of fact or law warranting reversal of the Regional Direc-

tor's findings and recommendations or requiring hearing; that commencing on or about February 17, 1968 the Union requested the Respondent to bargain for the appropriate unit, and that commencing on or about February 27, 1968, the Respondent refused to bargain with the Union, although the Union is the collective bargaining representative.

On March 27, 1968, the Respondent filed its Answer in which it admitted certain allegations of the complaint and denied others. Specifically the answer admits the jurisdictional allegations, the appropriateness of the bargaining unit, the fact of the election and the certification of the Union, the Union's request to bargain and the Respondent's refusal thereof. The answer denies, however, that the Union is the representative of the employees and denies the commission of unfair labor practices. Affirmatively the answer contests the validity of the election and the certification, and the failure to grant a hearing on its objections.

On March 28, 1968, Counsel for the General Counsel filed a Motion for Summary Judgment on the ground that the pleadings disclose no factual matter in dispute requiring hearing and that the General Counsel is therefore entitled to judgment as a matter of law.

On April 1, 1968, I issued an Order to Show Cause, (amended on April 2, 1968) on the Motion for Summary Judgment returnable April 15, 1968. Thereafter the Union filed a Memorandum Brief in support of the General Counsel's motion for summary judgment and the Respondent a Memorandum in Opposition to the motion.

The Respondent in its memorandum urging that a Board Decision[2] issued subsequent to the Board's Decision and Certification of Representative established a new rule governing the previous determinations of fact by the Regional Director and the Board, and therefore required hearing, I issued a further order on April 18, 1968 deferring ruling on the motion for summary judgment in order to afford the Respondent opportunity to file with the Board a motion for reconsideration of the Decision and Certification of Representative. On May 7, 1968, the Board issued its Order denying the motion of the Respondent for reconsideration, finding that the *Milchem* case "clearly inapposite" and that the motion for reconsideration constituted nothing not previously considered by the Board.

The issue is therefore whether the General Counsel's motion for summary judgment should be granted.

Ruling on Motion for Summary Judgment

In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litigation before a Trial Examiner in an unfair labor practice case of issues which were or could have been litigated in a prior related representation proceeding.[3] This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial or material issues are raised by

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[2] *Milchem, Inc.*, 170 NLRB No. 46, issued March 14, 1968.

[3] *Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance Company*, 163 NLRB No. 71. See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 161-162 (1941); Rules and Regulations of the Board, Section 102.67(f) and 102.69(c).

the objections.[4] That there is no such issue here has been decided by the Regional Director and the Board. In these circumstances the Board's disposition of the representation matter constitutes the law of the case at this stage of the proceeding. The refusal to meet and confer with the Union being conceded, the refusal to bargain is established, there are no issues litigable before a Trial Examiner, no matter requiring hearing, and summary judgment is therefore appropriate.[5] The General Counsel's motion for summary judgment is granted, and on the basis of the record I make the following further:

Findings and Conclusions

I. The Business of the Respondent

Respondent is a Wisconsin corporation engaged in the manufacture of transformers and other electrical devices at its Goldsboro, North Carolina, plant, which plant is the only one involved in this proceeding.

Respondent, during a typical 12-month period, which period would be representative of all times material herein, expects to receive goods and materials valued in excess of $50,000, which goods and materials will be shipped to its Goldsboro, North Carolina, plant, directly from points and places outside the State of North Carolina. During the same period of time, Respondent expects to produce

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[4] *O.K. Van & Storage, Inc.*, 127 NLRB 1537, 297 F. 2d 74 (C.A. 5, 1961); *LTV Electrosystems, Inc.*, v. *N.L.R.B.*, F. 2d (C.A. 4, 1968), 67 LRRM 2602. And see *N.L.R.B.* v. *Air Control Window Products, Inc.*, 335 F. 2d 245, 249, (C.A. 5, 1964): "If there is nothing to hear, than a hearing is a senseless and useless formality."

[5] *LTV Electrosystems* v. *N.L.R.B., supra.*

and ship products valued in excess of $50,000 from its Goldsboro, North Carolina, plant, to points and places outside the State of North Carolina.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

All production and maintenance employees employed by Respondent at its Goldsboro, North Carolina, plant, excluding office clerical employees, production control expediters, professional employees, technical employees, confidential employees, guards and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all times since February 12, 1968, the Union has been, and is now, the representative of the majority of the employees in the appropriate unit for purposes of collective bargaining and by virtue of Section 9(a) of the Act has been and is now the exclusive bargaining representative of all the employees in said unit for the purposes of collective bargaining.

Commencing on or about February 17, 1968, and continuing to date, the Union has requested, and is requesting, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment as the exclusive bargaining representative of all employees of Respondent in the appropriate unit.

Commencing on or about February 27, 1968, and continuing at all times thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive collective bargaining representative of the employees in the appropriate unit.

By refusing to bargain collectively with the representative of its employees the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions, I recommend that the Board issue the following order:

ORDER

A. For the purpose of determining the effective period of the certification, the initial year of certification shall be deemed to begin on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.[6]

B. Hevi-Duty Electric Company, a Division of Sola Basic Industries, Inc., Goldsboro, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Communications Workers of America, AFL-CIO, as the exclusive collective bargaining representative of the employees in the following appropriate unit:

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[6] The purpose of this provision is to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, 328 F. 2d 600 (C.A. 5, 1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421, 350 F. 2d 57 (C.A. 10, 1965).

All production and maintenance employees employed by Respondent at its Goldsboro, North Carolina, plant, excluding office clerical employees, production control expediters, professional employees, technical employees, confidential employees, guards and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in said appropriate unit as the exclusive collective bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Communications Workers of America, AFL-CIO, as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its Goldsboro, North Carolina, plant copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms to be furnished by the Regional Director for Region 11, after being duly signed by an authorized representative of the Respondent, shall be posted

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[7] In the event that this recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 11, in writing, within 20 days from receipt of this recommended Order, what steps it has taken to comply herewith.[8]

Dated at Washington, D.C.—May 13, 1968.

Charles W. Schneider,
Trial Examiner

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[8] In the event that this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 11, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX D

Goldsboro, North Carolina

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HEVI-DUTY ELECTRIC COMPANY, A DIVISION OF SOLA INDUSTRIES, INC.

Employer

and Case No. 11-RC-2623

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted on November 1, 1967, under the direction and supervision of the Regional Director for Region 11 among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished a tally of ballots which showed that, of approximately 150 eligible voters, 145 cast ballots, of which 76 were for and 63 were against the Petitioner. There were 6 challenged ballots. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the Rules and Regulations of the National Labor Relations Board, the Regional Director conducted an investigation and, on December 4, 1967, issued and duly served upon the parties his Report on Objections in which he recommended that the objections be overruled and that the Petitioner be certified as the collective bargaining representative of the employees involved. There-

after, the Employer filed timely exceptions to the Regional Director's Report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that all production and maintenance employees at the Employer's Goldsboro, North Carolina, plant, excluding office clerical employees, production control expediters, professional employees, technical employees, confidential employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Board has considered the Employer's objections, the Regional Director's Report, and the Employer's exceptions thereto, and hereby adopts the Regional Director's findings and recommendations.[1]

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[1] The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing.

Accordingly, as the tally shows the Petitioner has obtained a majority of the valid ballots cast, we shall certify it as the collective-bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that Communications Workers of America, AFL-CIO, has been designated and selected by a majority of the employees in the unit found appropriate herein, as their representative for the purposes of collective bargaining and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Dated, Washington, D. C. February 12, 1968

John H. Fanning, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX E

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Region 11

HEVI-DUTY ELECTRIC COMPANY, A DIVISION OF SOLA INDUSTRIES, INC.

Employer

and

Case No. 11-RC-2623

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Petitioner

REPORT ON OBJECTIONS

Pursuant to a Stipulation for Certification Upon Consent Election[1] approved by the Regional Director of the Eleventh Region on October 5,[2] a secret ballot election was held under the supervision of the Regional Director on November 1, with the following results:

Approximate number of eligible voters	150
Void ballots	1
Votes cast for Petitioner	76
Votes cast against participating labor organization	63
Valid votes counted	139
Challenged ballots	6
Valid votes counted plus challenged ballots	145

Copies of the Tally of Ballots were duly served on the authorized representatives of the parties.

On November 8, the Employer filed timely objections to conduct affecting the results of the election. A copy of the

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[1] The unit found to be appropriate is: "All production and maintenance employees at the Employer's Goldsboro, North Carolina, plant, excluding office clerical employees, production control expediters, professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act."

[2] All dates are 1967 unless otherwise specified.

objections was duly served on the Petitioner. The text of the Employer's objections is as follows:

> "1) A Union observer, Perry Wyatt, during the time of the election and while acting as official observer, engaged in conduct in direct violation of the instructions given him by the Board agent, engaged in electioneering, and deported himself in such a manner as to convey the impression to employees in the bargaining unit that he was dominating the election procedure and that they must vote or incur his and the Union's wrath.
>
> "(2) The Union, at the conference held prior to the election, raised a frivolous issue as to the status of one of the Company's observers, causing such observer to be withdrawn at the last minute, thereby interfering with the Company's rights, impeding the election process and giving the impression to employees in the bargaining unit of Union dominance over the Board's election procedure.".

Pursuant to Section 102.69 of the Board's Rules and Regulations (Series 8, as amended), an investigation of said objections has been conducted. All parties have been afforded full opportunity to submit and present evidence bearing on the issues and the undersigned, having carefully considered the evidence disclosed by the investigation, reports as follows:[3]

OBJECTION (1):

The election arrangements provided, *inter alia,* that each party would have two observers, one to identify employees at the polls and the other to carry the releasing

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[3] Only incidents which occurred between September 26, the date of the filing of the petition and October 5, the date of the election are considered. See *The Ideal Electric and Manufacturing Company,* 134 NLRB 1275, 1278.

signs through the plant. Witnesses presented by the Employer state that during the election they observed Perry Wyatt, the Petitioner's releasing observer, waving the releasing sign from side to side and shouting "Winders now voting" as he went through the Winding Department. According to these witnesses, Wyatt was also observed on several occasions apparently speaking to voters as he showed them the sign and he allegedly stopped three individual voters and engaged them in short conversations as they progressed toward the polling area. The witnesses state that they did not overhear what was said between Wyatt and the others. The witnesses also state that toward the end of the polling period both Wyatt and the Employer's releasing observer informed some employees that the polls would close shortly and that there was not much time left for voting.

Wyatt denies that he engaged in any electioneering or campaigning during the election, or that he engaged employees in conversations as he performed his duties. This is confirmed by employee witnesses. No evidence was presented or otherwise adduced during the investigation to show that Wyatt engaged in any conversation with employees unless it was to answer questions concerning the voting procedure.[4]

Wyatt was described by witnesses presented by the Employer as being in a jovial mood, contrary to his usual nature, but no evidence exists to show that Wyatt engaged in any electioneering or in any activities calculated to impair the exercise of free choice in the election.[5] The under-

[4] It is undisputed that Wyatt made an obscene remark during the course of the election, but this was addressed to the other observer, and had nothing to do with voting in the election.

[5] Though one Employer witness stated that he smelled alcohol while in the presence of the releasing observers, no evidence was presented to show that Wyatt was drinking, nor was this witness' observation corroborated by other witnesses.

signed finds that the evidence in support of the first objection is insufficient to raise substantial or material issues with respect to the conduct of the election and recommends that said objection be overruled.

OBJECTION (2):

The evidence is undisputed that at the preelection conference the Employer was informed that Petitioner planned to challenge the ballot of Kauff as a supervisory employee. At that time the Employer voluntarily chose to withdraw Kauff as an observer and substitute another in his place. No evidence was presented or otherwise adduced during the investigation to show, as the Employer contends, that its voluntary withdrawal of Kauff as an observer interfered with its rights, or the rights of any employees, impeded the election process, or gave the impression to employees in the bargaining unit of Petitioner dominance over the Board's election procedure. The undersigned finds that Objection (2) raises no substantial or material issues and recommends that it be overruled.

CONCLUSIONS AND RECOMMENDATIONS

The undersigned has recommended that all the Employer's objections be overruled. As the Tally of Ballots shows that Petitioner has received a majority of the valid votes cast in the election, the undersigned further recommends that a Certification of Representatives be issued.

Dated at Winston-Salem, North Carolina this 4th day of December 1967.

Reed Johnston, Regional Director
National Labor Relations Board
Region 11
1624 Wachovia Building
Winston-Salem, North Carolina 27101

APPENDIX F

Pertinent Excerpts from United States Constitution, Amendment V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1254(1) of Title 28 of the United States Code.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following method:

(1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Section 160(e) of Title 29 of the United States Code

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice

in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of

its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Pertinent Excerpt from Section 102.69(e) of the National Labor Relations Board Rules and Regulations

"(e) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. * * * "

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 461

HEVI-DUTY ELECTRIC COMPANY, A DIVISION OF SOLA BASIC INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 410 F. 2d 757. The Board's decision and order are reported at 172 NLRB No. 98 (Pet. App. 3-13); its decision in the related representation proceeding is set forth at Pet. App. 14-20.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1969 (Pet. 2). The petition for a writ

of certiorari was filed on August 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly overruled the employer's objections to a representation election without holding an evidentiary hearing, upon finding that the objections presented no material issues of fact.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * *
>
> Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

The relevant provision of the National Labor Relations Board Rules and Regulations, Series 8, as amended (29 C.F.R. 102.1, *et seq.*), is set out at Pet. App. 23.

STATEMENT

Pursuant to a stipulation of the parties, a representation election was held at the Hevi-Duty Electric Company plant at Goldsboro, North Carolina on November 1, 1967. The Union, the Communications Workers of America, AFL-CIO, won the election and the Company filed objections with the Board's Regional Director alleging that: (1) a Union election observer, Perry Wyatt, engaged in electioneering and deported himself in such a manner as to give the impression that the Union was dominating the election procedure; and (2) at the conference held prior to the election, the Union frivolously challenged one of the Company's observers on the ground that he was a supervisor, causing him to be removed as an observer—thereby interfering with the Company's rights and again giving the impression that the Union was dominating the election procedure (Pet. App. 18).

After an administrative investigation of the Company's objections, the Regional Director reached the following conclusions respecting the first objection: The Company and the Union agreed that each would have two observers at the election, one to identify employees at the polls and the other to carry signs throughout the plant releasing particular groups of employees to vote. Company witnesses stated that Perry Wyatt, a Company employee and the Union's releasing observer, waved the releasing sign from side to side and shouted "Winders now voting" as he went through the Winding Department; that Wyatt

spoke to several voters as he showed them the sign and stopped three voters and engaged them in short conversations as they progressed toward the voting area, but they did not overhear what was said; and that, toward the end of the polling period, both Wyatt and the Company's releasing observer told some employees that the polls would close shortly and that there was not much time left for voting. There was no evidence that Wyatt engaged in any electioneering or in any activities calculated to impair the exercise of free choice in the election. (Pet. App. 18-19.)

Respecting the second objection, the Regional Director found that at the preelection conference the Company was informed that the Union planned to challenge the ballot of Wilbur Kauff, on the ground that he was a supervisory employee. Kauff was to have been a Company observer, but the Company then substituted another. There was no evidence that the Company's voluntary withdrawal of Kauff as an observer in any way interfered with its rights or the rights of its employees, impeded the election process, or gave the impression to employees that the Union dominated the election. (Pet. App. 20.)

The Regional Director concluded that the Company had raised no substantial or material issues with respect to the conduct of the election which warranted an evidentiary hearing, and recommended to the Board that the Company's objections be overruled (Pet. App. 20). The Company filed exceptions to the Regional Director's report that contested his conclusions, including his failure to order a hearing on the

objections (R. 13-18).[1] The Board upheld the Regional Director, finding that the Company's exceptions "raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing" (Pet. App. 15, n.1).

The Company refused to bargain with the Union, and an unfair labor practice complaint issued. The Trial Examiner granted the General Counsel's motion for summary judgment (Pet. App. 8-9). The Board adopted the Trial Examiner's decision holding that the Company had violated Section 8(a)(5) and (1) of the Act, and ordered it to bargain with the Union (Pet. App. 3-4). The court of appeals sustained the Board's findings and enforced its order (Pet. App. 2).

ARGUMENT

The question posed by petitioner (Pet. 2)—whether "an objecting party [is] entitled to a post-election evidentiary hearing when * * * prima facie evidence is supplied which presents substantial and material factual issues regarding the validity of such election"—is not presented on this record. The Regional Director, who was upheld by the Board, found that petitioner's objections presented no substantial or material factual issues; and the court below sustained that finding. Thus, the petition presents only the factual issue whether petitioner's ex-

[1] "R." refers to the appendix filed by the parties in the court below.

ceptions raised material or substantial factual issues. Such an issue does not warrant further review.

Moreover, the Board properly declined to conduct an evidentiary hearing in this case. As the Fifth Circuit recently pointed out: "If the objecting party shows, by specific evidence which *prima facie* would warrant setting aside the election, the existence of substantial and material factual issues which can be resolved only after an opportunity to observe and examine witnesses, an evidentiary hearing will be ordered. [Citations omitted.] To meet this burden, there must be 'specific evidence of specific events from or about specific people' in support of allegations having a basis in law sufficient to overturn the election. [Citations omitted.]" *National Labor Relations Board* v. *Golden Age Beverage Co.*, 71 LRRM 2924, 2928-2929 (No. 26286, July 7, 1969).[2] Petitioner failed to satisfy this test. As the Regional Director found: "Wyatt was described by witnesses presented by the Employer as being in a jovial mood, contrary to his usual nature, but no evidence exists to show that Wyatt engaged in any electioneering or in any activities calculated to impair the exercise of free choice in the election" (Pet. App. 19).

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[2] There, the Fifth Circuit distinguished the line of cases relied on by petitioner (Pet. 6-7), on the ground that they "involve objections whose very nature and possible impact upon the employees' free choice are of an entirely different order than */ * * [the] poorly supported and insubstantial objections [here] * * *." 71 LRRM at 2929-2930, n. 6.